

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ALEXANDER SWAN, 2D,

Appellant,

vs.

THE FIRST CHURCH OF CHRIST, SCIENTIST, IN BOSTON,
MASSACHUSETTS, ETC., *et al.*,

Appellees.

APPELLEES' ANSWERING BRIEF.

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FILED

JUN 17 1954

PAUL P. O'BRIEN
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APPELLEES' ANSWERING BRIEF.

No Federal Jurisdiction.

The first seven pages of Appellant's Opening Brief attempt, but fail, to show federal court jurisdiction. There is pending a Motion to Dismiss Appeal. After argument, the motion was, by order of this Court, continued for further hearing at the time of argument on the merits. Appellees submitted Points and Authorities in Support of Motion to Dismiss, appellant submitted Answering Points and Authorities, and appellees served and filed a Reply Memorandum of Points and Authorities. Oral argument was made on May 17, 1954, and then this court continued the Motion as stated.

Careful analysis and application of the governing principles of law will, we believe, show that neither by his complaint, nor the Record, nor his Opening Brief, has appellant discharged his affirmative burden to show federal jurisdiction. This, we respectfully urge, makes consideration on the merits unnecessary.

It would burden the Court to repeat the argument already filed and submitted showing, as we feel, that there is no federal jurisdiction.

Facts From the Record.

The court below dismissed the first and second counts of the Second Amended Complaint on the ground that each failed to state a claim for relief. Consequently, the material facts relating thereto are from the face of appellant's complaint. The motion to dismiss the third count was treated by the trial court as a motion for summary judgment, and dismissal entered for the reason that there was no genuine issue of material facts. Therefore, the third count dismissal involves facts on the record in addition to those from the face of the Second Amended Complaint.

This statement will avoid the formalistic language of the pleadings, and states the facts shown by the record in "everyday" terms.

Appellant became a member of The Mother Church in 1930 (par. XIV, p. 16*). Sometime thereafter he had class instruction in Christian Science, and made a showing that as of 1934 he was qualified for publication of

*References are to the Printed Transcript of Record.

his name, address and telephone number in *The Christian Science Journal* under the classified caption "Christian Science Practitioners and Teachers" (par. XV, pp. 17, 18). Appellant paid the annual charge for such listing until October 17, 1949, when he voluntarily withdrew therefrom (par. XV, p. 18).

(Parenthetically, "class instruction" in Christian Science means a two weeks' course of intensive teaching and study, and is intended to develop and increase the individual's understanding of Christian Science. It does not necessarily imply that the individual will immediately, or ever, professionally become a Christian Science practitioner. Relatively few such students do become full-time Christian Science practitioners. Many who are not listed in the *Journal* engage part-time or wholly in healing by prayer as taught in Christian Science. Some of such individuals gradually engage in full-time healing ministry as Christian Science practitioners, and then are listed in the *Journal* if they prove to the satisfaction of The Christian Science Board of Directors their eligibility [par. 5, pp. 72-74]. No one but that Board can make that determination.)

Appellant voluntarily withdrew his listing in October, 1949. Then he wrote and had published a book called "God on Main Street" (par. II, p. 27). Appellant, himself, states his motive and purpose in writing his book was to present "* * * the teachings, precepts, purposes, and blessings of Christian Science * * * in a manner that would be entertaining, appealing, understandable, and readily acceptable * * * (to those) who have been and are prejudiced against Christian Science * * * (and to those) who are Church Members but

who may be sporadic Church attendants * * * to the clergy of all faiths * * * (and) to the medical profession" (par. III, p. 28). Appellant asserts that his book is "an explanation and dissertation of, on and concerning the beliefs and teachings of Christian Science" (par. X, p. 32). (Parenthetically, his whole problem is the feeling that others *must* accept his concepts.)

On July 21, 1950, appellant tendered the manuscript of his book, "God on Main Street," to appellees for publication. He says appellees made no comment or request to examine the manuscript (par. IV, p. 29). Appellant then had his book printed and published elsewhere, had it copyrighted and sent a copy to appellees (par. V, p. 29).

May 10, 1951, appellant applied for reinsertion of his name in the *Journal* as a full-time practitioner (par. XVIII, p. 20). Appellees have failed to resume such advertisement-listing (par. XIX, p. 20).

Appellant has not been disciplined or removed as a member of appellee-Church, nor has any disciplinary action been taken against him as a practitioner. He still has the right to practice Christian Science (par. XIX, p. 20), but, plaintiff-appellant asserts, failure to resume the advertisement-listing has "handicapped and prevented" appellant in resumption of his practice (par. XXIV, p 23).

Appellant also complains that appellees refused to advertise his book in *The Christian Science Monitor* (par. VIII, p. 31).

Next, but only on information and belief, appellant asserts that appellees "conspired * * * to hinder, delay and deny circulation of said book * * * amongst

the members of the Christian Science faith and among members of the public generally * * * (and) have impugned (*sic*) and vilified (*sic*) * * * the character, motives, ethical and professional standing of plaintiff (appellant) in a manner * * * intended to injure, diminish, harm and destroy the value and status of said book” (par. VI, pp. 29, 30); also that appellees “* * * notified * * * branch churches, reading rooms, book stores and sellers of literature * * * (not to) sell or distribute * * * said book” and that, if they did so, appellees would thereafter “refuse * * * to subsequently furnish them with * * * literature” published by appellee Publishing Society (par. VII, pp. 30, 31).

The Manual of The Mother Church—The First Church of Christ, Scientist, in Boston, Massachusetts, by Mary Baker Eddy, governs appellees and appellant as a member of that Church (par. XIII, pp. 15, 16). The Manual by-laws provide that “only the (said) Publishing Society of (said) The Mother Church selects, approves, and publishes the books and literature it sends forth” (Manual, Art. XXV, sec. 8, p. 81) and that “the literature sold or exhibited in the Reading Rooms of Christian Science Churches shall consist only of * * * writings * * * by Mary Baker Eddy * * * (and) also the literature published or sold by the Christian Science Publishing Society” (Manual, Art. XXI, sec. 3, p. 64). “That said reading rooms purchase all their reading materials, of all types and descriptions, exclusively from * * * The Christian Science Publishing Society” (par. VIII, p. 12).

Also, under the ecclesiastical polity of The Mother Church and under the Manual by-laws governing appel-

lees and all members of The Mother Church, including appellant as a member thereof, no member shall "buy, sell, nor circulate Christian Science literature which is not correct in its statement of the divine Principle and rules * * * of Christian Science"; and "A member of this Church shall not patronize a publishing house or bookstore that has for sale obnoxious books" (Manual, Art. VIII, secs. 11, 12, pp. 43-44).

Facts are in large measure taken from the Second Amended Complaint with appropriate references. Such facts, plus additional undisputed facts from the official by-laws of appellees (a part of the record herein) were found by the Trial Court to be true (Findings (i) and (j), p. 110). They are the basis upon which the Court dismissed the third count (par. 5, pp. 106-111) on motion for summary judgment.

Preliminary Observations of Relief Sought.

Before analysis of the formal causes pleaded and theories argued in support thereof, it will be helpful to see how naively appellant discloses the real purpose of his lawsuit. It is to promote the sale of his book. He pleads that:

"* * * said book, 'God on Main Street' is an explanation and dissertation of, on and concerning the beliefs and teachings of Christian Science and that said book's acceptance by the public in general and members of the Christian Science faith *is dependent upon the status and position* of plaintiff as an approved, authorized and registered Christian Science Practitioner." (Par. X, p. 32.) (Emphasis added.)

Appellant's zeal for his book blinds him to the fact that he seeks to bludgeon an ecclesiastical body, charged with sincere exercise of its own spiritual discretion and judgment, into acceptance of appellant's views. His zeal for his book leads him into the assertion that his freedom to speak and write takes away appellees' freedom not to officially approve what appellant writes.

Plaintiff-appellant withdrew his *Journal*-listing as a practitioner. He wrote his book and then said to appellees:

(1) Here is an "explanation and dissertation * * * concerning the beliefs and teachings of Christian Science * * *"

(2) Now, even though under the Manual by-laws you, as Directors, are responsible for the Christian Science movement and have the responsibility of deciding what is correct literature about Christian Science and of determining its proper means of distribution, I insist that my book is correct and desirable and you should give it direct, or at least implied approval, and I insist that you *must*

- (a) accept and examine my book or manuscript;
- (b) publish a review of it;
- (c) advertise it in your newspaper;
- (d) publish and circulate it through branch church Reading Rooms;
- (e) let it be sold in association with your own official Christian Science publications;
- (f) put my name back in the *Journal*-listing as qualified to practice Christian Science healing because thereby a wholly extraneous purpose may be accomplished—that is, "said book's acceptance by the public in general and members of

the Christian Science faith is dependent upon * * * (my) status and position * * * as an approved, authorized and registered (or listed) Christian Science Practitioner;”

(3) And, if you don't do these things, I shall sue you, and charge that you have

(a) prevented me from doing healing work by prayer (which anyone, listed or not, may do in proportion to his consecration and spirituality, as exercise of his religious freedom);

(b) Conspired to hinder, delay and prevent circulation of my book by

(i) refusing to let me use a practitioner's listing as a means of promoting my book and its concepts of Christian Science; and

(ii) refusing to publish, to advertise, to sell, to associate your religious literature with my book, or otherwise give direct or implied ecclesiastical sanction to my book;

(4) And, I will argue (although I won't plead or charge it) that you, in carrying out your ecclesiastical duty under the Manual by-laws, are unduly restraining interstate commerce and violating the federal anti-trust laws to my personal detriment.

A fair analysis of appellant's pleading and brief and the Manual, which appellant himself pleaded, will show just such a strange mixture of brash temerity and naivete as outlined above. Yes, more: It will show the extraordinary notion that appellant's freely conceded right to author, publish and promote becomes in appellant's view the complete deprivation of the right of those in ecclesiastical authority to do their duty, or even to refuse to join in promoting what they cannot approve. He would utilize

the church publications and procedures to promote sale of his book.

Appellant's zeal for his own concept of the beliefs and teachings of Christian Science impels him to say that *his* judgment must prevail over those with whom final ecclesiastical discretion is vested; that failure to concur with appellant's concept means conspiracy to do wrong—even violation of the Sherman Anti-Trust Act. No matter how sincerely appellant feels that *he* is more able to present religious teachings of Christian Science to the world than those having responsibility therefor, the law does not give him the right to *force* direct or implied approval of his views. Appellant's expressed purposes in writing his book are worthy. They certainly are not decried. His freedom to write and publish in this blessed land of guaranteed freedom is complete! No one seeks to stand in his way, so long as he *stands on his own responsibility* for what he has written, and lets his writings be considered on their *own merit*. Appellant has the *freedom to speak*; appellees also have the *freedom of not having appellant speak for them*, and for the whole Christian Science movement.

Appellant would turn his freedom to speak and publish into a claim of legal and commercial damage because appellees *dared not to speak* and *dared not to give him status* which would promote his "book's acceptance by the public in general and members of the Christian Science faith" in particular. If appellant could force direct or indirect approval of his views by this lawsuit, he would have discovered a means of exacting publication promotion from those who could not approve his views—yes, by those vested with responsibility for preserving purity of a religious teaching. Freedom to speak, as

freedom of religious views, is a two-way street. Freedom of appellant to write or speak for *himself* cannot, by appellant's *ipse dixit*, be made his authority to write and speak for *others*.

But how does appellant present his position? His complaint is divided into three purported causes of action. Appellant's first and second causes are each predicated upon appellees' refusal to reinsert his name, address and telephone number along with *Journal*-listed practitioners. By the first count he seeks to compel reinsertion; by the second count he claims damages. The third count incorporates the allegations of the prior two counts, and adds the information-and-belief assertion of conspiracy to interfere and suppress sale of appellant's book. Not until his last argument in the Court below did plaintiff-appellant think of bolstering his case by arguing what he never pleaded, violation of the Sherman Anti-Trust Act.

Appellant Did Not State a Claim for Relief in Either the First or Second Count of Second Amended Complaint.

Appellant contends that he has a legal right to compel reinsertion of his name, address and telephone number as an advertisement-listing in the *Journal*.

He affirms that he has not been deprived of his right to practice the calling of the healing ministry by any church procedure or other legal means (App. Op. Br., p. 15). No one could deprive appellant of the religious freedom to practice Christian Science. Failure to reinsert such listing is asserted to be a deprivation, *not* of the *right* to practice, but simply of *approval* of his *status* as a Christian Science practitioner; and such deprivation of approval is construed as the "sole means" of depriving appellant indi-

rectly of his right to practice Christian Science (App. Op. Br., pp. 15, 19). In effect, appellant complains that appellees will not *aid him*. He complains of non-action or non-feasance. He claims he must have the advertising value of the *Journal*-listing which would hold him out as approved for practicing a healing ministry; that appellees must give implied approval of appellant's educational, spiritual and moral qualifications to bolster his status as a Christian Science practitioner, even when appellant naively admits that he wishes the listing to promote sale of his book. The *Journal*-listing is not an approved authors' list.

Whether any man is at any given time to be officially listed as qualified to practice and teach Christian Science, or any other religious faith, is an internal ecclesiastical matter. No civil court is equipped to review or make such determination for any religious body. Even more so, the endorsement of such qualifications by listing in appellees' religious publication is an ecclesiastical matter. The civil courts can not exercise that judgment for a church; and they have uniformly declined to do so.

In order to bring the subject matter of the alleged non-feasance within the jurisdiction of civil courts, appellant emphasizes "professional" standing with independence from church control, particularly from an economic standpoint. He asserts his right to practice and teach Christian Science as a "property right." By argument, appellant says in effect: "Once qualified, always qualified." "Because you found me qualified educationally, spiritually and morally in 1934 to be *Journal*-listed, I have a 'property right' for continuous approval which a civil court must protect, even though you may feel that until I cease to be obsessed with a desire to use that approval to promote sale of my book I should not again be listed."

Although appellant would characterize a practitioner's calling as a mere "property right," instead of a ministry of healing through prayer (a view, the very statement of which is shocking), the determination of whether appellees shall (by accepting his listing in the *Journal*) impliedly approve his educational, spiritual and moral qualifications to publicly practice Christian Science healing is, we repeat, solely a matter within the religious body. Appellant would have this Court sit on a question of spiritual fitness to be a practitioner; he asks that appellees be required to give their implied endorsement consequent on advertising appellant in the *Journal*. None of appellant's authorities even remotely tend to clothe any Court with jurisdiction or the peculiar ecclesiastical qualifications necessary to adjudicate such question. Imagine courts seeking to qualify themselves to exercise ecclesiastical polity every time any dissident member of any religious group sought to force his views and statements on the balance of that religious body by a court-exacted approval of what in fact the church-governing board could not approve!

Appellant quotes from two recent California Supreme Court cases which apply the general rule that courts will not interfere with religious societies in regard to their ecclesiastical practices; that only civil and property rights of such bodies and members thereof, are the proper subject of adjudication in the secular courts. (*Providence Baptist Church v. Superior Court*, 1952, 40 Cal. 2d 55, 251 P. 2d 10; *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church*, 1952, 39 Cal. 2d 121, 245 P. 2d 481.) In both these cases, civil and property rights were the subject of litigation. In the *Providence Baptist Church* case the church brought a declaratory relief action to determine whether it had properly followed the estab-

lished procedure in removing its pastor. Also it sought to recover church funds and documents in the possession of the pastor. It is noteworthy how meticulously the Court disclaimed jurisdiction over the very type of question which appellant vainly sought below and now seeks to have this Court adjudicate. Near the end of the opinion, the Court said (bottom page 63, California Report):

“If the problem was whether the pastor was preaching a theology contrary to the denominational doctrine or conducting religious services in a manner out of harmony with the ritual of the church, it would clearly not be within the province of a Court to interfere, and the controversy would have to be settled by the church tribunals.”

To paraphrase the California Supreme Court, in the case at bar: Whether Swan correctly wrote “an explanation and dissertation * * * concerning Christian Science” or whether appellees should impliedly endorse Swan’s educational, moral and spiritual qualifications to publicly practice Christian Science healing so as to secure “acceptance by the public * * * and members of the Christian Science faith” for his book, or whether appellees should give his book express or implied approval, are questions clearly not within the province of a Court to interfere.

Also in the *Rosicrucian* case the litigation concerned title and right to use of real and personal property as between two litigating factions of the Rosicrucian philosophy. The court sustained jurisdiction to adjudicate property matters, but again carefully drew the distinction between ecclesiastical matters and civil and property rights.

Near the bottom of page 131 of the opinion as reported in the official California Reports, the Supreme Court says:

“The matter has been generally summarized: ‘It is obvious that no case can reach the civil courts unless it involves some property or other civil right. The courts of the land are not concerned with mere polemic discussions, and cannot coerce the performance of obligations of a spiritual character, or adopt a judicial standard for theological orthodoxy, or determine the abstract truth of religious doctrines, *or adjudicate whether a certain person is a Catholic in good standing*, or settle mere questions of faith or doctrine, or make changes in the liturgy, or dictate the policy of a church in the seating of the sexes, or the playing of instrumental music, or decide who the rightful leader of a church ought to be, or *enjoin a clergyman from striking the complainant’s name from his register of communicants*, or enforce the religious right of a member to partake of the Lord’s Supper.’ (American Church Law, Zollman, Sec. 313.)” (Emphasis added.)

There are two cases in which Kosher meat dealers asserted a “property” status in their established business of selling Kosher meat to adherents of the Jewish faith. In such case the livelihood of the dealer depended upon the wholly commercial business of merchandising Kosher food in regular commerce to the people of the Jewish faith. The dealers complained that the church had no right to terminate their supply of Kosher products. The court in both cases held that it was an ecclesiastical question and solely for the church to determine whether the dealers should be supplied with Kosher meat, and that the civil courts were without jurisdiction to give the dealers any relief. (*Cohen v. Silver*, 277 Mass. 230, 178 N. E. 508; *S. S. & B. Live Poultry Corp. v. Kashruth Ass’n*, 158 Misc. 358, 285 N. Y. Supp. 879.)

Under no circumstances do publishers have any affirmative duty to accept tendered advertisement-listing. Even in an ordinary situation, to compel *Journal*-listing, appellant would have to show a duty to advertise his name, address and telephone number. There is no such legal duty. And here where it implies current approval of spiritual and religious qualification, such listing is not a matter for court determination.

Even in ordinary situations, the authorities are uniform that a newspaper or magazine has no legal obligation to accept tendered advertising. (*Shuck v. Carroll Daily Herald*, 215 Iowa 1276, 247 N. W. 813, 87 A. L. R. 975; *Reeda v. The Tribune Co.*, 218 Ill. App. 45; 66 C. J. S. 47, Newspapers, Sec. 21; Thayer on *Legal Control of the Press*, 2d Ed. 1950, p. 128, Sec. 27.)

In *Reeda v. The Tribune Co.*, *supra*, a candidate for judicial office claimed that the newspaper had intentionally omitted his name from specimen primary ballots prepared by the Illinois Election Board and printed in the newspaper. The court held that there was no duty to include plaintiff's name as a candidate along with the others printed on the specimen ballot.

It was contended in these newspaper advertisement cases that newspapers and magazines are "clothed with a public interest" and that it must accept tendered advertising. The merchants and people who sought to force the advertisements asserted that failure to accept their advertising indirectly caused them damage in competitive commercial enterprises.

Appellant's position is much weaker than an entrepreneur in the competitive commercial market. Here, plaintiff-appellant cannot get court assistance to force *Journal*-

listing so as to show Church-approved qualification for healing ministry. Appellant feebly tries to convert his religious calling of healing by prayer into a “property right” or commercialized activity. He completely ignores his burden to establish an affirmative legal duty of appellees to aid him in using and turning a wholly religious calling into the means of promoting sale of a book.

Appellant’s Third Count Viewed in the Light of Competent Affidavit-evidence, Presents No Genuine Issue of Material Facts. Summary Judgment Was Proper.

There Was Competent Evidence Before the Trial Court.

At pages 9 and 36 of Appellant’s Opening Brief he contends that the trial court considered incompetent evidence which cannot be relied upon to support a summary judgment because affidavits bringing such evidence into the record do not “show affirmatively that the affiant is competent to testify to the matters therein stated,” as required by Rule 56(e).

The findings in support of summary judgment (pp. 106-111) are based almost wholly upon allegations of appellant’s complaint. Only findings (i) and (j) on page 110 of the Transcript of Record contain material facts outside appellant’s pleading. Yet even these two findings are based on the official by-laws governing appellant and appellees contained in the Manual of The Mother Church, The First Church of Christ, Scientist, in Boston, Massachusetts, by Mary Baker Eddy. Moreover, appellant himself pleaded this Manual to be such official by-laws (par. XIII, pp. 15, 16), and in finding (i) the Trial Court found this allegation of plaintiff-appellant to be true. Appellant himself has produced copies of said Manual in this Honorable Court

as part of the record on appeal. He now complains of the competency of the very Manual he pleaded below and made part of the record here.

Moreover, the Manual was also introduced into the Trial Court record as an exhibit attached to the affidavit of Gordon V. Comer, shown affirmatively to be an officer, to-wit, the Clerk of appellee, The First Church of Christ, Scientist, in Boston, Massachusetts, whose office and duties are set forth in the Manual (pp. 75, 76); and further, as part of that affidavit, Hazel A. Firth, Manager of the Executive Office of the Trustee-Directors of said Church, and custodian of the records of said Church, certified the attached Manual to be a "true and correct copy thereof and constitutes the law, rules, by-laws and polity of the Christian Science religious denomination" (p. 80). The affidavit of Clayton B. Craig affirmatively shows affiant to be one of the five Trustee-Directors who are charged with the responsibility of managing and directing the affairs of appellee Church. Craig also affirmatively identified the copy of Manual attached to the Comer affidavit as a "true copy" (pp. 53, 54). The same is true of the affidavit of Alfred Pittman, who is affirmatively shown to be chairman of said Trustee-Directors (pp. 71, 72).

There Is No Genuine Issue as to Any Material Facts.

None of the findings of fact in support of summary judgment as to the third cause of action resolved a fact conflict. All of said findings are based upon the material fact allegations of appellant's third cause of action, except portions of findings (i) and (j) on page 110 of Transcript of Record. Portions of findings (i) and (j) are quoted from the official by-laws, which govern both appellant, as member, and appellees.

Manual quotations in finding (i) simply establish uncontroverted facts that the duty to “select, approve and publish books and literature it sends forth” (Manual, Art. XXV, sect. 8, pp. 81, 82) is solely vested in appellee Publishing Society; also that Readings Rooms of branch churches are restricted in the sale and exhibition of religious literature to that which is published or sold by appellee Publishing Society (Manual, Art. XXI, sect. 3, p. 64). Such facts do not create a conflict with any material allegation of appellant. Indeed, appellant’s own complaint (par. VII, p. 12) alleges: “* * * That said reading rooms purchase all their reading materials, of all types and descriptions, exclusively from said defendant (appellee), The Christian Science Publishing Society.” In finding (i) this allegation was also found to be true (p. 110).

The by-laws, when coupled with appellant’s own allegations, show the absurdity of appellant’s effort to allege conspiracy, when he charges that appellees induced or saw fit to induce branch church Reading Rooms to ban sale of appellant’s book. In one breath, appellant affirms that branch church Reading Rooms acquire, and must acquire, their religious literature *exclusively* from appellee Publishing Society, and, in the next breath, appellant contends violation of the anti-trust laws if appellees remind Reading Rooms of the by-laws which restrict them to appellees’ religious literature. The by-laws produce no conflict with what appellant had already alleged; the by-laws affirm the exclusive source of religious literature sold and exhibited in Reading Rooms.

Finding (j) in support of summary judgment (p. 110) quotes from these same official by-laws, adopted for the guidance of all Church members, including appellant and

all appellees. They provide that no member of appellee Church shall “buy, sell, nor circulate Christian Science literature which is not correct in its statement of the divine Principle and rules * * * of Christian Science” (Manual, Art. VIII, sect. 11, p. 43), and that “A member of this Church shall not patronize a publishing house or bookstore that has for sale obnoxious books” (Manual, Art VIII, sect. 12, p. 44).

These by-laws do not give rise to a legal fact issue as to whether appellant’s book is a correct concept of Christian Science doctrine, or whether “God on Main Street” is or is not an “obnoxious” book in the light of church polity or appellees’ own peculiar religious doctrine. A civil court is not equipped to decide, nor is it the least concerned with whether a church member complies with church doctrine or teachings, or whether a member has violated a by-law designed to prevent adulteration of church doctrine or teachings. Whether appellant’s book is an adulteration of Christian Science doctrine or teaching, and whether it is an “obnoxious” book, is not, and cannot be, a genuine issue in appellant’s law suit. It is solely a matter of ecclesiastical polity.

Said Manual by-laws quoted in finding (j) illustrate the exercise of religious freedom of a church to prevent adulteration of its own religious literature. Official religious literature of a church is not a commercial product to be sold in the competitive market of our business world. Swan, as a member of appellee Church, can not *force* sale or exhibition of his own concept of Christian Science doctrines and teachings alongside the official religious literature of appellee Church. The religious freedom of a church to publish and distribute its doctrines and teachings

certainly includes the right to preserve the purity thereof. Religious doctrines and teachings of a church are kept pure by ecclesiastical control of its official literature, and also by concern for that with which its official literature may be associated. The Manual by-laws obligate appellees to exercise ecclesiastical judgment in selecting unadulterated outlets for its official religious literature.

We repeat, whether Swan's book, "God On Main Street," does or does not correctly conform to Christian Science doctrines and teachings is not an issue in this lawsuit. Such question is an ecclesiastical matter outside the concern of a civil court. The quoted Manual by-laws in finding (j) in no sense contradict appellant's pleading and do not create a material fact issue, and such finding is not the result of factual conflict.

Not a Matter of Disciplinary Proceedings Against Appellant.

Among other elements thrown into, but never related to any legal issue in appellant's complaint, is that no charges, accusations or disciplinary proceedings have been had against him under the Church by-laws. If that shows anything, it shows almost immeasurable patience by appellees with appellant. Is appellant saying that he *should be* disciplined as a member of appellee Church?

The fact of record is that no disciplinary proceedings have been taken against appellant. But there is not, and cannot be, an allegation that because he is an undisciplined member of the Church he is thereby legally entitled to listing as a qualified and approved practitioner. The *Journal*-listing is not a membership list. And certainly it is not a list of authors.

What appellant argues is that somehow Courts should intervene because appellees did *not* do certain things. They (1) did *not* discipline him as a member; (2) they did *not* endorse or approve or publish or sell his book; (3) they did *not* review his book; (4) they did *not* advertise his book; (5) they did *not* indirectly promote his book by advertising or listing him for a wholly different purpose—that of practitioner.

An Unpleaded After-thought Assertion—The Sherman Anti-Trust Laws.

The Court below well observed that “in his brief, but not in his complaint (it was a *second* amended complaint) the plaintiff (appellant) attempts to bolster the third cause of action by contending his action is one for violation of antitrust law” (pp. 100, 101; parenthetical matter added).

Appellant’s Opening Brief continues this “bolstering” effort, by citing some wholly irrelevant law and decisions. We feel thoroughly apologetic for being forced to lengthen our brief with answer to such discussion, but feel we must deal with the point.

On what does appellant base his after-assertion of anti-trust violation?

(1) That appellees have interfered with or prohibited sale of appellant’s book in Christian Science Reading Rooms. This he says on information and belief. Yet, the Manual by-laws, which govern appellant and appellees alike, preclude sale of his book in those Reading Rooms because it was not selected, published or sold by the Publishing Society.

(2) Appellant also says he is informed and believes that appellees have interfered with sale of his book in bookstores generally by advising them if they sell appellant's book, appellees will not distribute authorized Christian Science literature through such stores.

Here again is unique application of legal doctrine in antitrust laws. Appellant contends that church officers of a religious group, charged with preserving purity of the peculiar religious movement of which they are a part, *must* sell their literature *in association with* (and so give implied approval by association to) that which they may disapprove or simply have not approved.

The real essence of appellant's complaint is that he has not succeeded in bludgeoning approval, publication, sale, and practitioner-listing-for-book-promotion-purposes from appellees. It is implicit in what appellees have *not* done that they cannot conscientiously approve, publish, distribute or give authorship sanction to appellant's book as Christian Science literature. They have acted with such Christianly restraint that they have neither done or said anything which gave appellant basis for *any* essential allegation of a conspiracy claim. He launches merely an "informed and belief" claim.

Appellees have obviously left the author, and his book, to stand on whatever literary or other merit either can demonstrate. Appellant is not satisfied. His unique idea would destroy all publishers and fragmentize every religious group into schismatic parts. He argues that Sherman Anti-Trust laws force publishers (and even church publishing houses) to approve, publish and sell whatever an ambitious author offers to them. This is *reductio ad absurdum*. It is not law—Sherman Anti-Trust law or other.

The Third Count Fails to State an Actionable Claim.

Appellant seems to argue in his Opening Brief (pp. 31-36)—yet, his complaint is innocent of it—that he and the appellees are *competitors* in the business of publishing and selling authorized and approved religious literature and books about Christian Science, and that appellees have unreasonably restricted appellant's freedom of competition, which affects interstate commerce, by shutting off certain desired channels to market his book; that branch church Reading Rooms and other book dealers, who sell and exhibit appellees literature, have been coerced by appellees' threats to withdraw distribution of their own religious literature if they handle appellant's book.

Appellant argues that he can *make himself* an authorized and church-approved author and publisher of Christian Science literature simply by writing a book. He wants more than freedom to speak and write for himself. He must be given official approval and become a competitor in production and sale of what only appellees may give official sanction. Appellant's theory is but a different way of saying that he wants *his* book *associated* with appellees' religious literature so as to gain the impression of implied approval by appellees—all to his pecuniary profit.

We fully agree that appellant is free to write and sell *his concept* of Christian Science doctrine and teachings in the "open market of ideas," but appellees are free to disassociate their religious literature from appellant's literature. Appellees are not obliged to *aid* him or *assist* him by permitting *association* of their literature with his!

Appellant's "information and belief" allegations, about not exhibiting or selling his book in Reading Rooms

(neither of which would or could be done in any event, for the book was neither published nor sold by the Publishing Society) adds nothing. It was no conspiracy. It was obedience to a Manual rule binding on the Reading Room of any branch church desiring to be recognized as a branch of The Mother Church.

Also, in paragraph VII (p. 30) we have another general "information and belief" allegation, which appellant did not and could not allege with any ultimate fact whatsoever. It is that the appellees "notified or informed" (*which* is it, and *how* done?) "book stores" not to handle appellant's book if they desired to sell "defendant's literature." Appellant argues that a religious organization, on such a general allegation (which appellant would not and could not allege as known fact or supported by ultimate fact of any sort), *violates* the antitrust laws should it determine by whom and in what association its literature should be sold. Since The Mother Church Manual is in the record, we quote again section 12 of Article VIII, binding on appellant and every other Mother Church member:

"Obnoxious Books. Sect. 12. A member of this Church shall not patronize a publishing house or bookstore that has for sale obnoxious books."

Would appellant argue that this by-law would make for violation of the antitrust laws when appellees obey it and refuse to deal with bookstores selling objectionable crime and sex literature, for example? This is not to thus characterize appellant's book, but, to show, preliminarily, the absurdity of arguing that religious authorities cannot protect their own religious literature from association with and thereby giving implied standing to what

may be deemed objectionable and incorrect presentations of the teachings of that same religion, at the risk of violation of the anti-trust laws.

Here is another Manual rule in Article VIII:

“No Incorrect Literature. Sect. 11. A member of this Church shall neither buy, sell, nor circulate Christian Science literature which is not correct in its statement of the divine Principle and rules and the demonstration of Christian Science. Also the spirit in which the writer has written his literature shall be definitely considered. His writings must show strict adherence to the Golden Rule, or his literature shall not be adjudged Christian Science. A departure from the spirit or letter of this By-Law involves schisms in our Church and the possible loss, for a time, of Christian Science.”

The rule shows the reason. And now we are told that appellees may not obey their ecclesiastical law to protect against “schisms in our Church” lest they violate the anti-trust laws. The above Manual sections, on the one hand, and appellant’s contention under the anti-trust laws, would put appellees in this horrible dilemma: Either violate your Church Manual, or be guilty of violating anti-trust laws!

There is no factual or legal basis for this wholly irrelevant discussion of Title 15 of the United States Code. Appellant has no cause of action to state, and certainly has stated no cause, under Title 15.

By no stretch of even appellant’s imagination is this anti-trust matter. But even in wholly different situations

where that law *is* involved, an action based on the federal anti-trust laws must show certain things:

“The complaint or statement must sufficiently allege (1) that defendant has done one or more of the things forbidden by the statute; (2) that transactions involved interstate commerce, and (3) were intended to, or had a necessary tendency to, or did impede, stifle, or hamper such commerce, and (4) otherwise prejudicially affected the public in the manner required to constitute the particular violation charged; (5) that plaintiff has suffered injury in his business or property different from that suffered by the general public; (6) and the nature and extent or amount of the injury sustained.” (58 C. J. S. 1123, Monopolies, Sec. 100b.)

The preparation of the proper pleading for federal anti-trust suits requires a statement of matters and their relation to each other far more extensive than that in a simple pleading in negligence tort or on contract. A complaint to state a cause of action must show not only damages sustained by the individual plaintiff, but also a violation of public rights prohibited by the Act. (*Bader v. Zurich Gen. Acc. & L. Ins. Co.* (D. C. N. Y., 1952), 12 F. R. D. 437; *Beegle v. Thompson* (7 Cir.), 138 F. 2d 875; *United States v. Schine Chain Theatres* (D. C.), 31 Fed. Supp. 270; *Emich Mtrs. Corp. v. Gen. Mtrs. Corp.* (7 Cir., 1950), 181 F. 2d 70, 75.)

“Broadly stated, the purpose of the Sherman Anti-Trust Act (and supplemented by the Clayton Act) is the preservation of a system of free competitive, economic enterprise and the protection of the public against the evils incident to monopolies

and contracts or combinations tending directly toward unreasonable suppression or restraints of *interstate trade or commerce*.” (58 C. J. S. 972, Monopolies, Sec. 18a.)

Justice Stone in the landmark case of *Apex Hosiery Co. v. Leader* (1940), 60 S. Ct. 982, 310 U. S. 469, 84 L. Ed. 1311, reviews the history, purpose and construction of the Sherman Act.

What Is an Anti-Trust Case?

The *Apex Hosiery* case brings out the following points—each fatal to the appellant’s new-found theory of restraint of trade to support his Third Count:

1. There must be “some form of restraint upon *commercial competition* in the marketing of goods or services.” It is plaintiff’s *sine qua non*.

2. Restraint upon commercial competition is not illegal *per se*. The “rule of reason” doctrine must be satisfied, and

(a) such restraint must be *substantial*,

(b) such restraint must be “undue or unreasonable,”

(c) such restraints have been generally condemned only when the purpose or effect was to raise or fix the market price.

3. Principal purpose of anti-trust laws is to protect the *public*, and suit by individuals may be maintained only if the restraint prejudicially affects the public.

4. The federal anti-trust laws are applicable only to unlawful restraints upon or affecting *trade or commerce of an interstate or foreign character*.

There Is No Commercial Competition Involved.

This Court realizes that appellees are not in any way in competition with appellant or his book. Appellant has written *his* concept of Christian Science. *This* he is entitled to do. He is *not* entitled to force appellees to advertise him or his book, to give implied approval to it, or to turn the *Journal*-listing of practitioners engaged in healing by prayer, into the extraneous and commercial purpose of procuring acceptance and sale of a book. Appellant may sell *his* concept or version. He cannot force appellees to abdicate their responsibility as to what shall be deemed or authorized or approved statement of Christian Science, so that appellant may *then* argue *his* version to be authorized or approved. This is a new system for *creating* competitive business status in purely religious publications.

Appellant's concepts, with and without the operation of religious bodies, is unique indeed! Think of the many zealous authors whose writings have not had acceptance, with no less assurance than appellant of what their writings could do, if accepted. They could force others in official position (by threats of anti-trust litigation) to give them "status and position" upon which their "books' acceptance" depends. Many a struggling author might thus have money success—at the expense of others and their most cherished religious and other purposes!

Actually, none of appellees is engaged in commerce in any profit-motive trading sense. The First Church of Christ, Scientist, in Boston, Massachusetts, is the name of the congregation or members of an unincorporated Massachusetts religious society. Its governing officers are also named defendants in this lawsuit by their desig-

nation of "The Christian Science Board of Directors." The Christian Science Publishing Society is named a party defendant, but that is only a name under which the allied publishing and evangelical activities of said Church are carried on as a religious trusteeship—a trusteeship established by a deed of trust which is separate and distinct from the Church founding deed of trust.

These are the named conspirator-parties. The sole purpose and function of each is religious. They are directors of and publishers solely for religious purposes. None is engaged in trade or commerce in the commercial sense of the anti-trust laws. The "Father's 'business'" in evangelical pursuits, is not commercial.

Appellant argues that even purely evangelical activities are within the meaning of "commerce" as used in the federal anti-trust laws. Not even organized baseball is considered "commerce" within such statute. (*Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs* (1922), 42 S. Ct. 465, 259 U. S. 200, 66 L. Ed. 898; *Toolson v. New York Yankees* (1953), 74 S. Ct. 78, 346 U. S. 356, 98 L. Ed. 20.)

Since the First Amendment to the United States Constitution protects the evangelical door-to-door activities of a colporteur from regulation by city license (*Murdock v. Pennsylvania* (1943), 63 S. Ct. 870, 319 U. S. 105, 87 L. Ed. 1292), the same Amendment is applicable to protect religious evangelism from regulation by Congress under the anti-trust laws. Sale of religious literature through Reading Rooms of branch churches or book-stores is an evangelical activity just the same as sale of religious tracts by colportage.

Analysis of appellant's contention that he is a commercial *competitor* of the appellees in the evangelical distribution of religious literature or books, illustrates the absurdity of his after-the-complaint theory to sustain the Third Count of his Second Amended Complaint. If appellant is willing to consider healing ministry as a mere business in the commercial sense, appellees cannot be legally forced to join him in that view, or become a commercial competitor of his.

Sale and distribution of religious literature for an evangelical purpose is but one form of exercising religious practice, and is guaranteed by the First Amendment. There may be "competition" between or among religious faiths in the advancement of their cause, but such "competition" is protected and guaranteed by the First Amendment. There may even be competitive presentation between an ecclesiastically-approved presentation and that which is unauthorized. This is *one* thing. It is not within the meaning of "commercial competition" as used in our anti-trust laws. It is quite another thing to ask Court assistance to *force ecclesiastical approval* of unauthorized writings, and thus *create* competitively "authorized" religious publications. Such an absurdity would not even create competitive commerce in the anti-trust sense.

Freedom of religion certainly includes the right to officially safeguard against implied or indirect approval of writings which do not constitute a part of a religious group's doctrine or teachings. One who seeks and fails to secure official approval of his religious writings cannot make those who deny such official approval commercial competitors committing conspiracy in restraint of trade. Appellant would have the freedom to evangelize (through

colporteurs or reading rooms) destroyed by application of the commerce clause to religion as a new type or trade or business.

There Is No Interstate Commerce, No Public Interest nor Unreasonable Restraint Involved.

Before federal anti-trust laws come into play, it is fundamental that the subject of restraint must necessarily affect *interstate* or *foreign* commerce. "The effect upon interstate commerce must be direct and not be remote and must be the result of an intent to restrain interstate commerce, or there must be a substantial and actual restraint of interstate commerce." (*Abouaf v. J. D. & A. B. Spreckles*, 1939, D. C. N. D. Cal., 26 Fed. Supp. 830, 833; *Holland v. Majestic Radio & Television Corp.*, 1939 D. C., S. D. N. Y., 27 Fed. Supp. 990.)

Plaintiff-appellant's pleading fails in any manner to set out the effect of the alleged conspiracy upon interstate or foreign commerce. In the first place, there was no "commerce" involved; and secondly, no "interstate" or "foreign" character to any supposed commerce.

Closely related to the fundamental point that federal anti-trust laws are designed to free interstate or foreign commerce from undue restraint, is the important point that the alleged conspiracy or wrong must prejudicially *affect the public*. The main object of federal anti-trust laws is to protect the public, and personal right of private suit is only incidental and subordinate to the element of prejudice to the public. (*Abouaf v. J. D. & A. B. Spreckles*, *supra*; *Arthur v. Kraft-Phenix Cheese Corp.*, 1937 D. C. Md., 26 Fed. Supp. 824.)

Plaintiff-appellant's pleading is totally devoid of any public interest. His complaint solely concerns an alleged wrong to him personally.

Another fatal point to appellant's federal anti-trust argument is the failure to indicate in his pleading any "undue" or "*unreasonable*" restraint upon interstate or foreign trade. *Standard Oil Co. v. United States*, 1910, 31 S. Ct. 502, 221 U. S. 1, 55 L. Ed. 619, pointed out that federal anti-trust laws only prohibit *undue* or *unreasonable* restraints. The fundamental test of "reasonableness" is its effect upon the public, *i.e.*, is it a detriment to the public. (58 C. J. S. 990, Monopolies, Sec. 23.)

Appellant's pleading is completely innocent of any alleged federal anti-trust wrong. But, even his argument omits the essentials of an anti-trust case. He complains simply because appellees will not *help him* to sell his book. He says that appellees (1) will not accept and examine my book or manuscript, (2) will not publish a review of it, (3) will not advertise it, (4) will not publish it and circulate it through branch church Reading Rooms, (5) will not let it be sold in association with official Christian Science publications, and (6) will not put his name back in the *Journal*-listing as qualified to practice Christian Science healing so as to give implied approval of said book and push its sale. Can appellant possibly argue that such alleged wrongful conduct is a "detriment to the public" and thereby an *undue* or *unreasonable* restraint upon interstate commerce!

We apologize (and perhaps appellant should) for taking this Court into a dissertation on a subject so wholly unrelated as anti-trust laws to appellant's disappointed hopes as an author seeking by devious means "status

and position” for his “book’s acceptance by the public.” However, the subject has been raised as a serious argument before this Court, and we have felt bound to deal with it.

Conclusion.

This effort to put the federal courts into the business of running the internal, ecclesiastical affairs of religious organizations, and to promote sale of appellant’s book should, we submit, be ended by:

Order dismissing the appeal for lack of federal jurisdiction, for clearly no such jurisdiction appears; or in the alternative, affirm the judgment of the Court below

- (1) Dismissing the first and second alleged counts of plaintiff-appellant’s second amended complaint for failure to state a claim; and
- (2) Dismissing the third count of said second amended complaint (on motion therefor, treated as a motion for summary judgment) on the ground that there is no genuine legal issue as to any material facts, and with prejudice to commencement of another action thereon.

Respectfully submitted,

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